BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W.
WASHINGTON, D. C. 20001-8002

DATE ISSUED: October 31, 1996

CASE NO: 94-INA-550

In the Matter of:

JAMRON DRUGS,
Employer

On Behalf of

NASHAT ATTALLAH BARSOUM,
Alien.

Appearance: John G. Parilla, Esq,
Parilla & Gellman, P.C., New York, NY
for the Employer and the Alien

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Nashat Attallah Barsoum ("Alien") filed by Employer Jamron Drugs ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, New York City, denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

Under Section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the

wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On November 9, 1992, as amended, the Employer filed an application for labor certification to enable the Alien, an Egyptian national, to fill the position of Pharmacist at a salary of $20.00 per hour, to be performed on a "Split Shift" from 9:00 a.m. to 9:00 p.m. with 4 hours off per day as needed. (AF 13). The job duties were:

> Advise Health professionals & public on use and selection of medicines. Dispense drugs and medicines as prescribed. Mix ingredients of preparations. Maintain customer profiles and records for reference.

(AF 13). The educational requirement was 4 years of college, with a Bachelor's degree in Pharmacy; the experience required was 3 years in the job offered. Special requirements consisted of "License of practice Pharmacy in the State of New York." (AF 13).

On February 15, 1994, the CO issued a Notice of Findings in which she concluded that the application was violative of 20 C.F.R. § 656.21(b)(2) because the Employer has failed to provide sufficient documentary evidence establishing that the requirements for the job opportunity are those normally required for the performance of the job in the United States, as the requirement of a split shift with four hours off per day was considered restrictive and unrealistic for the job outlined. The Employer was advised to amend the work schedule or document how the requirement arises from business necessity. (AF 33-34).

The Employer submitted rebuttal consisting of a letter dated March 14, 1994 from Sherif El Tahawy, the Employer's Owner. Mr. Tahawy indicated that he operated three pharmacies (two in Queens and one in Manhattan), that he was present at each pharmacy for approximately four hours per day, and that when he was not present he required the Pharmacist to be present, thus requiring the split-shift. He further indicated that if this violated any Labor Department regulations he would be willing to

amend the work schedule to a normal eight hour day mostly in the evenings and would "conform to modifying the job offer." (AF 35).

On April 7, 1994, the CO issued a Final Determination denying the application because the Employer had not established business necessity for the proposed work schedule (split-shift requirement) in accordance with 20 C.F.R. § 656.21(b)(2), and the Employer had not adequately demonstrated why an individual in this position must work the schedule required. The CO also added:

> Although employer also indicates willingness to amend the work schedule, opportunity to amend is an alternative to documenting business necessity as was indicated in the Notice of Findings. Employer cannot choose to document business necessity and at the same time state willingness to amend.

(AF 43.)

The Employer requested review of that denial by counsel's letter of April 25, 1994. (AF 45-46).[1] The file was sent to the Board of Alien Labor Certification Appeals.

DISCUSSION

In the instant case, the issue before us is whether there has been a showing of business necessity for the split-shift requirement. For the reasons set forth below, we find that the Employer has established business necessity by the unrefuted statement of its owner.

In order to establish business necessity under section 656.21(b)(2)(i), an employer must demonstrate that the job requirements (1) bear a reasonable relationship to the occupation in the context of the employer's business and (2) are essential to perform, in a reasonable manner, the job duties as described by the employer. ***In re Information Industries, Inc.***, 88-INA-82 (Feb. 8, 1989) (***en banc***).

In our view, the rebuttal submitted by the Employer adequately establishes business necessity. First, it shows that the job requirement bears a reasonable

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[1] Also present in the record is a July 15, 1994 memo to file in which the CO seeks to supplement the Final Determination. (AF 47). It appears that the CO has misread the Employer's explanation as she apparently concluded that the pharmacist to be hired (as opposed to the pharmacy owner) would be asked to rotate between the three pharmacies. In any event, we cannot consider this memorandum in our deliberations.

relationship to the occupation in the context of the Employer's business. In view of the fact that the Employer's owner has shown, through his unrefuted testimony, that he must rotate between three stores and requires the pharmacists to work a split shift in order to ensure coverage, the Employer has also shown that the requirement for shift work "is essential to perform, in a reasonable manner, the job duties as described by the employer." ***Information Industries, supra.*** While the CO has indicated that she does not accept the Employer's rebuttal, she has failed to state a basis for her conclusion or to make any kind of credibility findings. Quite simply, there is no reason to question the account given by the Employer's owner and his statement that split shifts are required to ensure full coverage of all three pharmacies, with only three pharmacists plus himself. While it would have been reasonable for the CO to question the Employer further concerning the specific shifts and coverage, she failed to do so, and we do not find a remand for such further inquiry to be necessary based on the record before us.

Accordingly, we find that the Employer has established business necessity for this restrictive requirements, and the application for labor certification must be granted.

We also note that while the Employer indicated a willingness to amend the application (ostensibly for the purpose of readvertising), the CO failed to afford it the opportunity to do so. Indeed, the Board has held that issuance of a Final Determination denying certification is inappropriate in certain cases where the employer indicates a willingness to cure the defect and readvertise in rebuttal. ***See Mash International Trading Co., Inc.***, 90-INA-70 (June 5, 1991) (rebuttal indicates willingness to clarify and amend requirements); ***Integrated Support Systems, Inc***., 93-INA-211 (Jun. 28, 1994) (rebuttal indicates willingness to readvertise and clarify requirement). This is true even when the Employer conditions its offer to cure on a determination that its rebuttal is not persuasive. ***See Sharon Babb***, 92-INA-068 (Mar. 31, 1993); ***A. Smile, Inc.***, 89-INA-1 (Mar. 6, 1990). Thus, even if we were not reversing the CO's determination, a remand would be required for the purpose of readvertisement.

ORDER

The Certifying Officer's denial of labor certification is hereby REVERSED and the Certifying Officer is ordered to GRANT labor certification.

For the Panel:

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PAMELA LAKES WOOD
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.